



The following constitutes the
Memorandum Decision of the Court.
Signed October 7, 2016


Roger L. Efremsky
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

In re:

Case No. 14-42018 RLE

Chapter 7

MATTHEW THOMAS CASTRO,

Debtor.

JOHN STIRTON and
BONITA INVESTMENTS, LLC,

Adv. Proc. No. 14-4115 RLE

Plaintiffs,

v.

MATTHEW THOMAS CASTRO, aka
MATT CASTRO, dba BAY VALLEY
REALTY, aka BV PROPERTY
MANAGEMENT,

Defendant.

MEMORANDUM DECISION AFTER TRIAL

1 On August 18, 2014, John Stirton ("Stirton") and Bonita
2 Investments, LLC ("Bonita" and, together with Stirton,
3 "Plaintiffs") timely filed a Complaint against defendant Matthew
4 Castro ("Castro"), seeking a non-dischargeable judgment pursuant
5 to Bankruptcy Code §§ 523(a)(2)(A), (a)(4) and/or (a)(6). This
6 court held a trial on the Complaint over a four-day period
7 between October 13, 2015, and October 16, 2015. At the
8 conclusion of trial, the court requested post-trial briefs from
9 the parties. The post-trial briefs were filed on February 1,
10 2016. Plaintiffs followed up their post-trial brief with an
11 *Errata* on February 3, 2016. Thereafter, the matter was taken
12 under submission. This Memorandum Decision constitutes this
13 court's findings of fact and conclusions of law under Fed. R.
14 Bankr.P. 7052.¹

15 **II. Factual Background**

16 As an initial matter, this section is intentionally brief
17 and general. The brevity is made necessary by Stirton's failure
18 (on behalf of Plaintiffs): (1) to establish a coherent timeline
19 of events; (2) to recall the events that underlie the complaint
20 in this case; and (3) to testify consistently regarding various
21 events.² While Castro's testimony suffered from similar defects,
22

23 ¹ The following abbreviations will be used: "Tr." indicates
24 the trial transcript; "Exh." indicates exhibit.

25 ²The court expressed its frustration with Stirton's
26 inability to recall events and/or testify consistently on various
27 occasions. See, e.g., Tr. Day 1 at 59:5-15 ("So, Mr. Stirton, .
28 . . I'm going to admonish you in your testimony. If you're not
sure you understand your attorney's question or anybody's
question to you, make sure you understand the question before you
answer it. Also, if you're not sure and you want to think about

1 his deficiencies are less meaningful as he did not have the burden
2 of proof at trial. Grogan v. Garner, 498 U.S. 279, 291 (1991).

3 **John Stirton**

4 Stirton is highly educated, with an undergraduate degree in
5 psychology, and a minor in mathematics from the University of
6 California Davis. After approximately twelve years working in
7 the electronics and telecommunications industry, he went back to
8 school and earned a degree in mathematics from San Jose State
9 University. Tr. Day 1 at 6:13-7:9. His work experience was
10 primarily in telecommunications and consisted largely of test
11 engineering, designing fixtures, product testing and helping in
12 product development and programming. Tr. Day 1 at 7:10-8:16.
13 While Stirton himself has no background in real estate, finance,
14 or law, his wife is a legal secretary who, at the time of trial,
15 had been working as such for over 25 years. Tr. Day 1 at 8:17-

16
17 it, take your time and think about it. But when you come back and
18 you answer a question one way and then later on, because maybe
19 you've flipped a page or two and you look at it differently, you
20 change your testimony, not only does it affect your credibility,
21 but it makes it very difficult to follow the case"); see also,
22 Tr. Day 1 at 61:7-10 ("We're talking about these documents, not
23 something that might look like it. So that [sic] if you're not
24 sure about this, it's very critical that you just simply say, I'm
25 not sure"); Tr. Day 1 at 72:11-23 (Court: "[I'm] not clear in my
26 mind that you were clear. And what's really critical here that I
27 have to get at is what representations, if any, that Mr. Castro
28 made to you versus something you may have assumed that was not
specifically represented to you." Stirton: "The representation
would have been that he was getting much greater returns from
this investment and that he - - ." Court: "What investment?
Specifically, what investment?" Stirton: "That would have been -
that's a good question, because I'm not really clear on what the
investment was"); Tr. Day 1 at 128:25-129:5 ("[T]he story is
changing. . . . [F]rankly, I find Mr. Stirton's recollection to
be very poor and it's not easy to follow the story.")

1 9:21.

2 Prior to meeting Castro, Stirton had invested over \$100,000
3 with an investment counselor named Gregory Hannah ("Hannah").³
4 Tr. Day 1 at 10:6-20. When the market declined in 2008 and 2009,
5 however, Stirton withdrew his funds from the investments he had
6 with Hannah. Tr. Day 1 at 11:3-7; 150:1-3. At some point
7 subsequently, Hannah informed Stirton that Castro was "flipping"
8 houses for profit and Hannah suggested that Stirton meet with
9 Castro. Tr. Day 1 at 10:22-11:4. Stirton then contacted Castro
10 to express his interest in investing in flipping projects. Tr.
11 Day 1 at 11:5-7; 11:24-12:8; Tr. Day 3 at 57:23-25.

12 **Matthew Castro**

13 Castro holds an undergraduate degree in Business Management
14 from St. Mary's College of California. Tr. Day 3 at 49:3-7.
15 Along with working as an account manager and sales person for
16 Alameda Electrical Distributors, Castro is an employee and owner
17 of his sole proprietorship, Bay Valley Realty ("Bay Valley") and
18 a 51% partner in Bay Valley Property Management. Tr. Day 3 at
19 49:10-50:9.

20 Bay Valley was first established in 2005 and, at the time of
21 trial, Castro was the broker and had one broker associate and
22

23 ³Stirton testified that he met Hannah when Hannah was a
24 speaker at a technical professional job search group that Stirton
25 was a member of. Tr. Day 1 at 148:3-8. Stirton says he found
26 Hannah to be credible, but never personally verified any of
27 Hannah's credentials; instead, relying on the fact that Hannah
28 had "certificates," had been "doing investments for a long time,"
"had the degree on the wall and, you know, he was authorized --
he was dealer [sic] -- or an investment broker for Transamerica
Corporation," and "there was a wide range of people who I met who
had testified to his authenticity." Tr. Day 1 at 148:9-149:3.

1 three licensed realtors working for him. Tr. Day 3 at 50:10-
2 51:12. Between 2010 and 2015, Castro estimates that Bay Valley
3 had done an estimated 300 flipping projects with Castro acting as
4 the broker.⁴ Tr. Day 3 at 51:16-21; 54:2-4.

5 **Stirton's Flipping Projects Via Bay Valley**

6 Between 2010 and 2012, Stirton, through his LLC, Bonita,⁵
7 invested in three flipping projects via Bay Valley. Tr. Day 1 at
8 12:11-15. Stirton was "hands off" in the flipping projects and
9 admits to doing very little due diligence on his own, instead
10 deferring to Castro and Bay Valley's expertise in real estate.
11 Tr. Day 1 at 15:4-23; 152:17-25; 164:22-165:17.

12 In the preliminary discussions with Castro regarding these
13 flipping projects, Stirton said that Castro told him the return
14 on investment would be in the 20-30% range. Tr. Day 1 at 16:25-
15 17:5. While Stirton only realized a return of somewhere between
16 2% and 22% on each of the three flipping projects, he testified
17

18 ⁴Castro and Stirton both testified that the way that these
19 flipping projects were structured was that Bay Valley's licensed
20 realtors (through their respective individual LLCs) would
21 purchase a property and investors would work directly with the
22 LLC to fund and complete the flip of the property. Castro had no
23 ownership interest in Bay Valley's realtors' LLCs and his role in
24 these flipping projects was simply to act as the broker for the
25 seller once the property was ready to be re-sold. Tr. Day 1 at
26 15:4-16:7; pp. 157-162, generally; Tr. Day 3 at 52:2-54:7.
27 Castro did, however, receive funds on top of his commission as a
28 broker if he brought in his own investors. Tr. Day 3 at 54:8-11.

25 ⁵Stirton testified that at or around the time of the first
26 flip, Castro told him that a LLC was necessary to protect Stirton
27 from personal liability from any lawsuits brought as a result of
28 the flipping project. Stirton also testified that Castro
29 assisted Stirton in forming Bonita. Tr. Day 1 at 22:5-19.
30 Castro denies that he provided any such advice or assistance.
31 Tr. Day 2 at 142:9-14.

1 that the actual returns gave credibility to the flipping projects
2 undertaken by Bay Valley and its realtors and that, as a result,
3 Stirton had a lot of confidence in Castro.⁶ Tr. Day 1 at 23:25-
4 24:10.

5 **James Wolfe and Revenue Generation Technologies**

6 At some point in late-2009 or early-2010, Castro's home was
7 going into foreclosure and he was introduced to a woman named
8 Lori Arzamendi ("Arzamendi")⁷ who referred Castro to a company
9 called Home Support Group ("HSG"). Tr. Day 2 at 128:14-129:4;
10 Tr. Day 3 at 62:21-22. HSG was described as an entity that
11 endeavored to assist underwater homeowners by modifying their
12 existing loans, or by purchasing the property and leasing it back
13 to the homeowner for a period of time until the homeowner was in
14 a position to repurchase the property (the "HSG Model"). Tr. Day
15 3 at 61:3-62:20. Although the HSG Model was unsuccessful in
16 Castro's case, and he ultimately lost his house to foreclosure,
17 he became and remained friendly with Arzamendi. Tr. Day 2 at
18 132:8-133:16; Tr. Day 3 at 66:8-14; 67:23-68:5.

19 Castro testified that in the latter part of 2012, Arzamendi
20 told Castro that she wanted him to meet a gentleman named James
21

22
23 ⁶Interestingly, Stirton acknowledged that he knew that
24 Castro's projections for a 30% return were unlikely. Tr. Day 1
25 at 24:4-8 ("The information that was given to me seemed valid and
26 appropriate, and [Castro] seemed to hold up on his word, that his
projections were correct in every case. I mean, outside the fact
that we were never going to make 30 percent on a number of those,
or I didn't foresee us doing that[.]").

27 ⁷Castro was introduced to Arzamendi by Leo Montoya, a man
28 described by Castro as a "mentor" who had worked for the FBI for
35 years prior to retiring. Tr. Day 2 at 134:21-24.

1 Wolfe ("Wolfe"), who was also allegedly involved with HSG. Tr.
2 Day 3 at 68:6-9; 69:22-70:2. Castro testified that Arzamendi
3 spoke very highly of Wolfe, allegedly representing to Castro that
4 Wolfe seemed to be a good businessman, had "contacts", went to
5 Michigan State, was part of the Magic Johnson Foundation, served
6 in the Gulf War, and considered Colin Powell to be a mentor. Tr.
7 Day 3 at 68:16-69:1.

8 Castro testified that he met with Wolfe multiple times in
9 early to mid-2013. During these meetings, Castro learned about
10 Wolfe's company, Revenue Generation Technologies ("RGT") and
11 about various aspects of RGT's business from Wolfe and from
12 others Castro met at the meetings. Castro recalled being very
13 impressed with Wolfe and his operation and being left with the
14 impression that RGT had experienced success in its various
15 endeavors.⁸ Tr. Day 3 at 70-89, generally. Castro testified
16 that at some point during the course of these meetings, he came
17 to understand that Wolfe wanted Castro to help find investors to
18 invest capital in RGT. Tr. Day 3 at 82:21-83:21; 88:11-14.

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25 ⁸While Castro recited various aspects of RGT's alleged
26 business, it was clear that he understood very little, if
27 anything, about any of it, including whether RGT made money, and
28 if so, how. Instead, it appeared to the court that Castro was
more impressed at the appearance of legitimacy portrayed by
Wolfe's office and the alleged contacts.

1 **The "Investments"⁹ at Issue**

2 Stirton testified that in early 2013, he was holding funds
3 in Bonita's bank account from the three flipping projects with
4 Bay Valley and from the sale of his residence. Tr. Day 1 at
5 21:23-22:3. Stirton wanted to invest the funds so he and a
6 colleague started looking for properties to flip on their own.
7 They were unsuccessful, however, as the market had started to
8 recover and prices on real properties were trending upward. Tr.
9 Day 1 at 20:17-21:22.

10 In late May of 2013, Stirton met with Castro multiple times
11 and expressed his interest in additional flipping projects or
12 real estate investments. Tr. Day 1 at 24:11-29:12. Stirton
13 testified that during the course of these meetings, Castro told
14 Stirton that the market had changed and that there were no longer
15 flipping opportunities, but that Castro had recently been
16 introduced to Wolfe and RGT, and that RGT was a new company and
17 "investment model" that Castro had been looking into. Tr. Day 1
18 at 176:1-7; Tr. Day 2 at 5:10-6:2. Stirton further testified
19 that Castro told Stirton about Wolfe's alleged connections,
20 shared his impressions of Wolfe, provided a copy of Wolfe's
21 LinkedIn bio and told Stirton that Wolfe was claiming that RGT
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23
24 ⁹The court uses the term "investment" very loosely to
25 describe the transactions at issue in the Complaint and only does
26 so because that is how the parties described them. The testimony
27 and evidence was clear, however, that the transactions were
28 nothing more than unsecured loans. See, e.g., Tr. Day 2 at
193:10-196:18; Tr. Day 3 at 11:12-16:20 (Castro's confusion
regarding whether the transactions were capital investments or
loans and ultimate acknowledgment that "investments" were, in
fact, loans).

1 was getting returns of over 18% on its investments.¹⁰ Tr. Day 1
2 at 49:21-50:9; 99:3-11; Tr. Day 2 at 6:3-11. Stirton testified
3 that he told Castro that the RGT "investment model" seemed risky
4 and that he could not afford to lose his investment. Tr. Day 1
5 at 76:5-14. Castro testified that in response, he told Stirton
6 to perform his own due diligence and not to invest if he did not
7 feel comfortable. Tr. Day 4 at 13:20-14:12; 50:7-20.

8 Stirton testified that he attempted to research Wolfe and
9 RGT via Google and LinkedIn, but was unable to find much
10 information. Tr. Day 1 at 99:18-100:16; 174:2-4. Stirton
11 admitted that he never met Wolfe and never asked to meet Wolfe,
12 but acknowledged that "it might have been a good idea." Tr. Day
13 1 at 86:20-87:2. Castro testified that Stirton never asked him
14 to get any additional information from RGT or Wolfe regarding
15 potential investments, never asked whether Castro had looked at
16 profit and loss statements, and never asked if Castro had
17 received any literature or written documents from RGT. Tr. Day 3
18 at 125:14-22.

19 Despite having virtually no facts about Wolfe and RGT and
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23 ¹⁰At trial, Stirton admitted that Castro never represented
24 that he had done any independent investigation of Wolfe or RGT
25 and never actually vouched for RGT, but Stirton got the
26 impression that Castro was vouching for Wolfe and RGT because
27 Castro had "met with the people and knew the people." Tr. Day 1
28 at 174:23-175:9; 183:19-184:24. Stirton also acknowledged that
Castro never represented that he was personally getting any
returns from RGT and that Stirton understood that Castro had not
personally invested in RGT, allegedly because he did not have the
funds to do so. Tr. Day 2 at 6:13-21.

1 only the vaguest grasp of the investments Castro had described¹¹,
2 Stirton agreed to cause Bonita to make an investment.¹²

3 Stirton testified that instead of Bonita investing directly
4 with RGT, however, Castro proposed, and Stirton agreed, to invest
5 indirectly through Castro's Nevada limited liability company,
6 Source Solutions Group, LLC ("SSG")¹³. Tr. Day 1 at 67:14-69:10;
7 185:21-23. In essence, SSG would act as a "middleman,"
8 collecting funds from Bonita and others¹⁴, and transferring those

10 ¹¹Tr. Day 1 at pp. 29-52; 65-75, generally (Stirton's
11 inconsistent and incomplete understanding of the various
investment models described by Castro).

12 ¹²Stirton testified that he ultimately decided to invest
13 because "I wanted to continue, you know, to have a relationship
14 with Mr. Castro based on the past investment. That I had a great
15 deal of confidence and trust in him and that I thought it was a,
16 you know, a credible idea in general, although I -- it occurs to
17 me in my testimony I'm unclear on the specifics, on the overall
18 concept of the idea of this package it sounded okay, and his
19 assurances that it would -- it was solid, you know." Tr. Day 1
at 75:9-20. Stirton's true motivation was revealed, however,
when he testified, "In fact, this [investment] was a way to reach
a level of investment with [Castro] that he [sic] could possibly
do something like a flip with in the long run." Tr. Day 1 at
77:24-78:2.

20 ¹³Castro testified that when he originally formed SSG, he
21 was working with HSG in an attempt to assist other underwater
22 homeowners in keeping their homes and intended to deposit any
23 commissions received as a result of services performed for HSG,
24 in SSG's account. He further testified that when he formed SSG,
25 he did so in Nevada because he believed it would result in tax
26 advantages and thought he could also use SSG for other business
ventures in the future. Tr. Day 2 at 147:1-148:16; 151:16-152:6;
158:14-159:7; 162:5-163:6; Tr. Day 3 at 131:18-132:5. Castro was
aided in forming and running SSG by an entity called Corporate
Nevada. Tr. Day 3 at 125-131, generally.

27 ¹⁴Stirton testified that prior to transferring any funds to
28 SSG, Castro told Stirton that Castro had other clients that were
also investing with RGT on similar terms. However, Stirton

1 funds to RGT. Then, based on an agreement between RGT on the one
2 hand, and SSG on the other, RGT would pay a return on investment
3 to SSG¹⁵ and, via a separate agreement between SSG and Bonita,
4 SSG would pay a smaller return on investment to Bonita. See
5 generally, Tr. Day 1 at 74:13-75:8; 85:1-13; 186:5-187:11.
6 Stirton testified that the transactions were structured this way
7 because Castro was brokering the investment deals with his
8 personal contacts and therefore, was going to get a higher rate
9 of return on the investments.¹⁶ Tr. Day 1 at 85:1-9.

10 On June 11, 2013, Stirton caused Bonita to wire \$100,000 to
11 SSG's bank account. Pl. Exh. 7. Two days later, on June 13,
12 2013, Stirton caused Bonita to wire an additional \$25,000 to
13 SSG's bank account, for a total investment of \$125,000 (the
14 "First Investment"). Pl. Exh. 7; Tr. Day 1 at 93:9-24. The

15 _____
16 testified that Castro never provided the names and number of any
17 such investors. Importantly, it does not appear that Stirton
18 ever specifically asked for this information. Tr. Day 1 at
19 116:20-118:1; 119:8-11; Tr. Day 2 at 190:11-13. Castro denied
20 that he ever represented to Stirton that there were any other
investors and testified that when Stirton transferred funds to
SSG, Castro intended to find more investors. Tr. Day 2 at 190:5-
15; Tr. Day 3 at 135:23-136:1.

21 ¹⁵The promissory note between RGT and SSG was dated June 10,
22 2013 (although allegedly not signed until June 12, 2013), and
23 provided for a principal investment of between \$100,000 and
\$300,000, and a return of between \$100,000 and \$500,000, with
interest at the rate of 50% for a period of 180-days (the
"RGT/SSG Promissory Note"). The RGT/SSG Promissory Note also
24 contained a personal guarantee by Wolfe in the event that RGT
25 failed to pay SSG as promised. Pl. Exh. 8.

26 ¹⁶Castro denied this and testified that he "figured that
27 [Stirton] would be more comfortable funneling [the funds] into
something of mine because of what we had in terms of our
relationship, rather than sending it directly to someone that was
28 new, that we just didn't know much of." Tr. Day 3 at 135:8-20.

1 funds were subsequently transferred from SSG's bank account to
2 RGT.¹⁷ Tr. Day 3 at 45:6-15; 136:18-138:8; Def. Exh. O.

3 In July of 2013, Stirton caused Bonita to wire an additional
4 \$50,000 to SSG's bank account (the "Second Investment"). Tr. Day
5 1 at 82:4-17; 93:2-8; Pl. Exh. 10(1). Castro testified that the
6 funds were intended to go to an entity called Labyrinth
7 Technologies for the development of securities market-predicting
8 software that RGT was interested in leasing.¹⁸ Tr. Day 2 at
9 204:11-14; Tr. Day 3 at 151:13-152:4; 154:16-22. While the
10 evidence at trial was clear that the \$50,000 was transferred out
11 of SSG's account, it was never established where the funds
12 actually went.¹⁹

14 ¹⁷\$220,000 was the total amount actually transferred to RGT.
15 \$125,000 of that amount were the funds invested by Stirton and
16 \$95,000 of that amount were funds provided by an individual named
Richard Wright. Tr. Day 3 at 139:17-22.

17 ¹⁸Castro testified that after the First Investment, Stirton
18 contacted Castro and said that Bonita had an additional \$50,000
19 to invest. Castro testified that he shared the Labyrinth
20 investment opportunity and Stirton indicated his intent to
21 invest. Tr. Day 3 at 156:2-157:1. Initially, Stirton testified
22 that he was not told that Bonita would be investing in Labyrinth
23 and assumed that the additional \$50,000 was to go to the First
Investment, and not a different/new investment. Later in his
testimony, he acknowledged that he may have been told that the
Second Investment was going to Labyrinth and he may have simply
assumed the funds were going to RGT. Tr. Day 1 at 82:9-17; 88:1-
90:4; 98:25-99:2; Tr. Day 2 at 10:1-10; 11:4-12:20.

24 ¹⁹Castro testified that a woman named Alma Perez was
25 Labyrinth's principal and that Labyrinth did not have an account,
26 thus Wolfe (who was "working in conjunction with Alma Perez")
27 instructed Castro to send the funds to an entity called Forex
Capital Markets. Castro further testified that he believed that
28 the funds ultimately went from Forex to an entity called ATC
Brokers, who was "communicating with" Labyrinth. Tr. Day 2 at
pp. 208-214, generally; 218:6-219:6; Tr. Day 3 at 45:16-22;

1 At Stirton's request, the First Investment and Second
2 Investment were memorialized by two separate promissory notes,
3 both dated July 17, 2013, and executed by Castro on behalf of SSG
4 on one hand, and Stirton, on behalf of Bonita, on the other (the
5 "Promissory Notes").²⁰ Pl. Exhs. 6, 7 and 9; Tr. Day 1 at 82:24-
6 83:1; Tr. Day 2 at 15:6-20; 17:17-25. The Promissory Note
7 documenting the First Investment provided for a return of 15-20%,
8 payable 180 days following the date of the note.²¹ Pl. Exh. 6.
9 The Promissory Note documenting the Second Investment provided
10 for a return of 5-10%, payable 90 days following the date of the
11 Promissory Note. Pl. Exh. 9. Stirton testified that he read
12 through the Promissory Notes prior to signing them, but that "a
13 lot of this seemed like language that I didn't get, to be
14 honest," and "at the time - well, I thought they were, I mean,
15 ridiculous. . . . I thought they were not written as well as

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17 155:2-12; Tr. Day 4 at 44:3-45:7; Pl. Exh. 13. While a copy of
18 an email from Castro directing Corporate Nevada to transfer the
19 funds to Forex was introduced at trial, no cancelled check was
20 ever produced to show that the funds were received by Forex and
21 nothing was produced to indicate that ATC Brokers ever held the
22 funds. See generally, Tr. Day 3 at pp. 189-195; pp. 202-03; Tr.
23 Day 4 at pp. 29-32; Pl. Exh. 13(1)-(3).

24 ²⁰The Promissory Notes were modeled after the RGT/SSG
25 Promissory Note. Tr. Day 2 at 36:2-6; Pl. Exh. 8. An important
26 difference, however, is that the RGT/SSG Promissory Note
27 specifically provided that Wolfe personally guaranteed the debt
28 to SSG. Pl. Exh. 8. The Promissory Notes between SSG and Bonita
29 contained no personal guaranty by Castro. Pl. Exhs. 6 and 9.
30 Stirton admitted at trial that he was able to review the RGT/SSG
31 Promissory Note prior to causing Bonita to transfer funds to SSG.
Tr. Day 2 at 28:15-25.

32 ²¹Stirton testified that despite the terms of the Promissory
33 Note, he wasn't actually expecting a rate of return in the 15-20%
34 range. Tr. Day 1 at 84:1-18.

1 might be done[, but I signed them because] I received assurance
2 from [Castro] that this was valid." Tr. Day 1 at 86:5-8; Tr. Day
3 2 at 37:10-19.

4 Castro testified that in November 2013, he began calling and
5 exchanging emails with Wolfe regarding the status of the First
6 Investment. He further testified that Wolfe's lack of
7 responsiveness led Castro to suspect that there were going to be
8 issues with repayment. Tr. Day 3 at 170:17-171:6. Wolfe
9 allegedly assured Castro that everything was fine. Tr. Day 3 at
10 171:7-172:2. Unfortunately, things were not fine and despite
11 informal attempts by Castro to collect, RGT and Wolfe never paid
12 the RGT/SSG Promissory Note. Tr. Day 3 at pp. 173-185; Def. Exh.
13 V. As a result, SSG was unable to repay the First Investment.

14 Castro also testified that at some point, he contacted Alma
15 Perez about the status of the Second Investment and was told by
16 Perez that it had lost money.²² Thereafter, Castro requested
17 that ATC Brokers transfer what was left of the \$50,000 back to
18 SSG's account. Tr. Day 3 at 45:23-46:2; Tr. Day 4 at 58:20-59:2.
19 Of the \$50,000 Second Investment, however, only approximately
20 \$36,000 was returned to SSG. Tr. Day 3 at 46:6-8. Subsequently,
21

22 ²²Castro testified that Alma Perez explained that there had
23 been a "computer glitch" and she forgot to turn off a "signal"
24 and, as a result, \$14,000 of the \$50,000 Second Investment had
25 been lost. The court has no idea what this means and it is clear
26 that Castro did not know, either. Tr. Day 2 at 217:7-16. Castro
27 testified that he has never received an accounting from
28 Labyrinth, ATC or anyone else showing definitively what happened
to the \$50,000. Tr. Day 3 at 30:8-25. At trial, Plaintiffs'
counsel surmised that Alma Perez may have taken the \$14,000 as a
fee or commission, but there was no evidence presented to support
that theory. Tr. Day 4 at 34:3-37:4.

1 Castro caused SSG to transfer approximately \$32,000 from SSG's
2 account to Bonita's account. Pl. Exh. 17(2)-(3); Tr. Day 3 at
3 46:9-13. Castro testified that the \$4,000 difference between the
4 \$36,000 returned to SSG by ATC Brokers and the \$32,000 SSG
5 ultimately paid to Bonita was the result of Corporate Nevada
6 paying renewal fees and past-due fees on SSG's behalf, and
7 reimbursing Bay Valley Realty for funds it had previously
8 advanced to SSG.²³ Tr. Day 3 at 46:14-47:11. Castro further
9 testified that he attempted to return the remaining \$4,000 to
10 Bonita, but never did. Tr. Day 3 at 47:13-48:15.

11 As of the date of trial, Bonita had not been repaid any of
12 the \$125,000 First Investment and had only been repaid \$32,000 of
13 the \$50,000 Second Investment.

14 **III. Non-Dischargability, in General**

15 The central purpose of the Bankruptcy Code is to permit a
16 deserving debtor to make peace with creditors and obtain a fresh
17 start, free of pre-existing debt. Grogan v. Garner, 498 U.S. 279
18 (1991). The bankruptcy discharge provides this fresh start.
19 Because an exception to discharge impairs a debtor's fresh start,
20 however, the limits on dischargability of debts contained in
21 section 523 are construed strictly against creditors and in favor
22 of debtors. Ghomeshi v. Sabban (In re Sabban), 384 B.R. 1, 5
23 (9th Cir. BAP 2008) (citing Klapp v. Landsman (In re Klapp), 706

24
25 ²³Castro testified that it was his understanding that
26 Corporate Nevada had authorization to automatically deduct fees
27 from any available funds in SSG's account. Tr. Day 3 at 131:4-
28 17. He further testified that he didn't realize that Corporate
Nevada was going to be taking funds out of the \$36,000 that was
returned by ATC Brokers to SSG, to pay SSG's outstanding
obligations. Tr. Day 3 at 47:3-16.

1 F.2d 998, 999 (9th Cir. 1983); Snoke v. Riso (In re Riso), 978
2 F.2d 1151, 1154 (9th Cir. 1992); Beaupied v. Chang (In re Chang),
3 163 F.3d 1138, 1140 (9th Cir. 1998)). While a central purpose of
4 bankruptcy is to allow an honest but unfortunate debtor a fresh
5 start, however, "a dishonest debtor . . . will not benefit from
6 his wrongdoing." Apte v. Japra (In re Apte), 96 F.3d 1319, 1322
7 (9th Cir. 1996) (citing Grogan v. Garner, 498 U.S. at 286-87).

8 In an action to determine the dischargability of a debt
9 under Bankruptcy Code § 523(a), plaintiff has the burden of
10 proving all elements of the claim for relief asserted by a
11 preponderance of the evidence. Grogan v. Garner, 498 U.S. at
12 291.

13 **IV. Section 523(a) Threshold Question**

14 Bankruptcy Code § 523(a) provides that "A discharge under
15 section 727 . . . of this title does not discharge an individual
16 from any debt... ." 11 U.S.C. § 523(a). A "debt" is defined as
17 a "liability on a claim." 11 U.S.C. § 101(12). A "claim" is a
18 "right to payment. . . ." 11 U.S.C. § 101(5). A "right to
19 payment" is "nothing more nor less than an enforceable
20 obligation." Johnson v. Home State Bank, 501 U.S. 78, 83 (1991)
21 (citation omitted). Inherent in, and underlying § 523(a) is the
22 assumption that in order for a debt to be determined to be
23 nondischargable as to a debtor, the debt must be enforceable
24 against that debtor. Here, the court finds that neither the
25 First Investment nor the Second Investment are enforceable
26 against Castro.

27 As an initial matter, the court acknowledges that the
28 Promissory Notes themselves are not entirely clear regarding

1 whether the obligor was SSG, Castro, or both. However, it
2 becomes evident that SSG was intended to be the sole obligor on
3 the Promissory Notes when viewed in light of the parties'
4 actions, the history of the parties' previous transactions and
5 Stirton's testimony at trial.

6 First, Bonita wired the funds for the First Investment and
7 Second Investment to SSG's bank account; not to Castro's
8 individual account.

9 Second, the Promissory Notes were modeled after the RGT/SSG
10 Promissory Note, with the critical distinction that the
11 Promissory Notes did not contain a personal guarantee by Castro.
12 Stirton admits to having seen the RGT/SSG Promissory Note that
13 contained Wolfe's personal guarantee before making the First
14 Investment. He also admits to having read the Promissory Notes.
15 Yet, he never requested that the Promissory Notes be amended to
16 include a personal guarantee by Castro. If he really believed
17 that Castro was personally liable or intended to be personally
18 liable on the First and Second Investments, it seems apparent
19 that he would have requested such an amendment.

20 Third, Stirton testified that he formed Bonita at Castro's
21 suggestion, and ran his investments through Bonita as a way of
22 shielding himself from personal liability. It is not credible
23 that Stirton believed that Castro was not using his own limited
24 liability company to shield himself from liability while advising
25 Stirton to do the same thing.

26 Fourth, none of the previous flipping projects Stirton had
27 participated in were structured between individuals; instead they
28 were all structured between Bonita and the respective LLCs of Bay

1 Valley's realtors. Thus the historical pattern contradicts the
2 theory that the First Investment and Second Investment were with
3 Castro individually.

4 Fifth, Stirton testified at trial that he understood that
5 the First Investment and the Second Investment and the Promissory
6 Notes were between Bonita and SSG. See Tr. Day 1 at 67:14-69:10;
7 185:21-23; Tr. Day 2 at 15:6-20; 17:17-25; Pl. Exh. 4.

8 Finally, the court notes that SSG is a Nevada limited
9 liability company. As a general proposition, under Nevada law,
10 unless otherwise provided in the articles of incorporation or a
11 signed agreement, "no member or manager of any limited-liability
12 company formed under the laws of [Nevada] is individually liable
13 for the debts or liabilities of the company." Nev. Rev. Stat.
14 Ann. § 86.371 (West 2016). Members or managers may incur
15 liability for the debts or liabilities of a Nevada LLC, however,
16 if "alter ego" liability is established. See Webb v. Shull, 270
17 P. 3d 1266, (Nev. 2012) ("We . . . assume, without deciding, that
18 the [alter ego] statute applies[.]"); Montgomery v. eTreppid
19 Technologies, LLC, 548 F.Supp.2d 1175, 1180-81 (D.Nev.2008)
20 (recognizing that federal and state courts have consistently
21 applied to LLCs corporate laws for piercing the corporate veil
22 under the alter ego doctrine); In re Giampietro, 317 B.R. 841,
23 845-46 (Bankr.D.Nev.2004) (recognizing that whether the alter
24 ego/corporate veil doctrine applies to LLCs in Nevada is a
25 question of first impression).

26 To establish alter ego liability in Nevada, the following
27 elements must be proved: (1) the LLC must be influenced and
28 governed by the person asserted to be its alter ego; (2) there

1 must be such a unity of interest and ownership that one is
2 inseparable from the other, and (3) the facts must be such that
3 adherence to the fiction of separate entity would, under the
4 circumstances, sanction a fraud or promote injustice.²⁴ In re
5 Giampietro, 317 B.R. at 848. Unfortunately, in preparing for and
6 conducting the trial, Plaintiffs assumed that Castro was
7 personally liable and failed to even pursue, let alone prove, an
8 alter ego theory of liability.

9 For all the foregoing reasons, the court finds that
10 Plaintiffs failed to carry their burden of proving by a
11 preponderance of the evidence that Castro was personally liable
12 for the debts created by the First Investment and Second
13 Investment. As a result, the court finds that § 523(a) does not
14 apply and the debts owed to Plaintiffs as a result of the First
15 Investment and Second Investment are dischargeable.

16 **V. Section 523(a) (2) (A)**

17 Assuming solely for the sake of argument and completeness of
18 the record that the debts owed to Plaintiffs are debts owed by
19 Castro personally, the court turns next to Plaintiffs' argument
20 that the debts are nondischargeable as debts obtained by "false
21 pretenses, a false representation, or actual fraud[.]" 11 U.S.C.
22 § 523(a) (2) (A). In the Ninth Circuit, the terms "false
23 pretenses" and "false representation" have the same meaning in §
24 523(a) (2) (A) as the term "actual fraud" and do not provide an
25

26 ²⁴To the extent that California law is the relevant law to
27 determine alter ego liability, it is similar in all material
28 respects to Nevada's. See, Cal. Corp. Code § 17703.04(a) and (b)
(West 2016); Walsh v. Kindred Healthcare, 789 F. Supp 2nd 1073,
1082 (N.D. Cal. 2011).

1 independent basis for finding a debt nondischargeable. See
2 Mandalay Resort Group v. Miller (In re Miller), 310 B.R. 185,
3 199-202 (Bankr. C.D. Cal. 2004) (analyzing the history of the use
4 of these terms in bankruptcy law); See also, Schneider v. Jagar
5 (In re Jagar), 2015 WL 4327902, *4 (Bankr. N.D. Cal., July 15,
6 2015) (citing In re Miller with approval).

7 To demonstrate that a debt is nondischargeable under §
8 523(a)(2)(A), Plaintiffs must establish by a preponderance of the
9 evidence: (1) misrepresentation, fraudulent omission or deceptive
10 conduct by Castro; (2) Castro's knowledge of the falsity or
11 deceptiveness of his statement or conduct; (3) Castro's intent to
12 deceive; (4) justifiable reliance by Plaintiffs on Castro's
13 statement or conduct; and (5) damage to Plaintiffs proximately
14 caused by their reliance on Castro's statement or conduct.²⁵
15 Ghomeshi v. Sabban (In re Sabban), 600 F.3d 1219, 1222 (9th
16 Cir. 2010) (citations omitted); Oney v. Weinberg (In re
17 Weinberg), 410 B.R. 19, 35 (9th Cir. BAP 2009) (citations
18 omitted). A claim may also arise from the concealment or
19 intentional non-disclosure of material facts. In re Jagar, 2015

20
21 ²⁵Following the trial in the matter, but prior to the
22 issuance of this Memorandum Decision, the Supreme Court issued
23 its decision in Husky Int'l Elecs., Inc. v. Ritz, 2016 WL 2842452
24 (U.S., May 16, 2016), holding that despite the limited definition
25 given by lower courts, the term "actual fraud," as used in 11
26 U.S.C. § 523(a)(2)(A) encompasses fraudulent conveyance schemes,
27 even when those schemes do not involve a false representation.
28 This court interprets the Husky Int'l Elecs., Inc. holding to
simply expand the scope of acts that support a finding that a
debt is nondischargeable under § 523(a)(2)(A) to include
fraudulent conveyance schemes. Because no fraudulent conveyance
scheme has been asserted and no evidence of such a scheme was
produced at trial, the court finds Husky Int'l Elecs., Inc. to
have limited, if any, relevance here.

1 WL 4327902 at *3 (citations omitted). Castro's knowledge and
2 intent to deceive may be inferred by circumstantial evidence and
3 from his conduct. Tallant v. Kaufman (In re Tallant), 218 B.R.
4 58, 66 (9th Cir. BAP 1998). A claim under § 523(a)(2)(A)
5 requires Plaintiffs to prove that the critical misrepresentation,
6 concealment or non-disclosure that they relied upon existed at or
7 before the moment in time when Plaintiffs transferred the First
8 Investment and Second Investment funds to Castro. In re Jagar,
9 2015 WL 4327902 at *3 (citing, Reingold v. Shaffer (In re
10 Reingold), 2013 WL 1136546, *5 (9th Cir. BAP, March 19, 2013);
11 New Falls Corp. v. Boyajian (In re Boyajian), 367 B.R. 138 (9th
12 Cir. BAP 2007)).

13 Here, Plaintiffs did not come close to proving any of the
14 elements of the § 523(a)(2)(A) cause of action by a preponderance
15 of the evidence. Of critical importance, Plaintiffs were unable
16 to articulate any misrepresentations (knowing or otherwise),
17 fraudulent omissions, or deceptive conduct by Castro when the
18 First Investment and Second Investment were made. When
19 questioned on the topic, it became clear that Stirton relied
20 solely on his own assumptions about what background information
21 Castro had, what the investments were, how they would work, and
22 their chances for success. See Tr. Day 1 at pp. 176-184,
23 generally; Tr. Day 2 at pp. 40-49, generally. And when
24 specifically questioned by the court regarding what information
25 Castro knew at or before the time of the First Investment and
26 Second Investment that, had he disclosed, would have caused
27 Stirton or Bonita not to make the investments, Stirton simply
28 testified, "I can't say that there's specific information." Tr.

Day 2 at 48:13-49:14; See also, Tr. Day 1 at pp. 181-182. As a result, the court was left with the distinct impression that Stirton failed to ask any questions at all. Ultimately, Stirton's laissez-faire attitude and complete lack of curiosity about where the \$175,000 would be going ensured that Castro never had to make any representations, true or otherwise. Stirton appears to have relied solely and blindly on the success of the previous flipping transactions, apparently in an attempt to remain in Castro's good graces so that he would be offered flipping opportunities in the future. Because Plaintiffs were unable to articulate any misrepresentations, fraudulent omissions and/or deceptive conduct by Castro at or before the First Investment and Second Investment, the entire cause of action must fail.²⁶

VI. Section 523(a) (4)

Again, assuming solely for the sake of argument and completeness of the record that the debts owed to Plaintiffs are debts owed by Castro personally, the court turns next to Plaintiffs' argument that the debts owed by Castro are nondischargable as debts that arose from "fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." 11 U.S.C. § 523(a) (4).

/ / / /

²⁶The court notes that the remainder of the required § 523(a) (2) (A) elements are premised on the existence of a misrepresentation, fraudulent omission or deceptive conduct. Because Plaintiffs failed to establish this threshold element, Plaintiffs also necessarily failed to establish the remaining elements.

1 ***a. Fraud or Defalcation While Acting in a Fiduciary***
2 ***Capacity***

3 To prevail on a nondischargability claim under this section,
4 Plaintiffs must prove not only Castro's fraud or defalcation, but
5 also that Castro was a fiduciary to Plaintiffs when he committed
6 the fraud or defalcation. Utnehmer v. Crull (In re Utnehmer),
7 499 B.R. 705 (9th Cir. BAP 2013) (citing Otto v. Niles (In re
8 Niles), 106 F.3d 1456, 1459 (9th Cir. 1997)); Honkanen v. Hopper
9 (In re Honkanen), 446 B.R. 373, 378 (9th Cir. BAP 2011)
10 (citations omitted).

11 Under non-bankruptcy law, the definition of "fiduciary" is a
12 broad one, involving trust, confidence and good faith. Ragsdale
13 v. Haller, 780 F.2d 794, 796 (9th Cir. 1986) (citations omitted).
14 That broad definition, however, is inapplicable in the
15 nondischargability context. Id. For purposes of § 523(a)(4),
16 the Ninth Circuit has adopted a narrow definition of "fiduciary"
17 as a relationship "arising from an express or technical trust
18 that was imposed before, and without reference to, the wrongdoing
19 that caused the debt[.]" In re Honkanen, 446 B.R. at 378-79.

20 While the scope of the term "fiduciary capacity" is a
21 question of federal law, the Ninth Circuit considers state law to
22 ascertain whether the requisite trust relationship exists. In re
23 Honkanen, 446 B.R. at 379 (citations omitted). "For a trust
24 relationship under § 523(a)(4) to be established, the applicable
25 state law must clearly define fiduciary duties and identify trust
26 property. . . . The mere fact that state law puts two parties in
27 a fiduciary-like relationship does not necessarily mean it is a
28 fiduciary relationship within 11 U.S.C. § 523(a)(4)." In re

1 Honkanen, 446 B.R. at 379 (internal citations omitted). If state
2 law does not "clearly and expressly impose trust-like obligations
3 on a party, courts will not assume that such duties exist and
4 will not find that there was a fiduciary relationship." Houng v.
5 Tatung Co., Ltd. (In re Houng) 2016 WL 145841, *1 (9th Cir., Jan.
6 11, 2016) (internal citations omitted); Double Bogey, L.P. v.
7 Enea, 794 F.3d 1047, 1050 (9th Cir. 2015) (citations omitted).

8 Here, Plaintiffs first argue that a fiduciary relationship
9 existed between Plaintiffs and Castro because Castro testified
10 that it did. This argument is nonsense. Castro was clearly not
11 qualified to testify as to whether his relationship with
12 Plaintiffs satisfied the legal definition of "fiduciary."
13 Further, even if he were qualified to testify in this manner,
14 Castro's testimony that Stirton trusted him and had confidence in
15 him falls well short of the legal definition.

16 Plaintiffs next argue that a fiduciary relationship existed
17 between Plaintiffs and Castro by virtue of Castro's real estate
18 license. This allegations misstates the law and the facts.

19 In California, a real estate licensee does not meet the
20 fiduciary capacity requirement of § 523(a)(4) solely based on his
21 status as a real estate licensee. In re Honkanen, 446 B.R. at
22 381. Instead, fiduciary obligations only attach when a licensee
23 is carrying out "licensed activities." In re Briles, 228 B.R.
24 462, 467 (Bankr. S.D. Cal. 1998); In re Rodriguez, 196 B.R. 537,
25 542 (N.D. Cal. 1996). As relevant here, "licensed activities"
26 include "solicit[ing] borrowers or lenders for or negotiat[ing]
27 loans or collect[ing] payments or perform[ing] services for
28 borrowers or lenders or note owners *in connection with loans*

1 *secured directly or collaterally by liens on real property[.]*"
2 Cal. Bus. & Prof. Code § 10131(d) (emphasis added). Castro was
3 not carrying out "licensed activities" as defined by Cal. Bus. &
4 Prof. Code § 10131(d) because the First Investment and Second
5 Investment were not secured by (or proposed to be secured by) any
6 liens on real property. In fact, despite knowing very little
7 about the investments, Stirton acknowledges that he did know that
8 they were not intended to be nor were they actually secured by
9 liens on real property. Tr. Day 1 at 185:14-188:7. Thus,
10 Castro's activities do not fall within the scope of "licensed
11 activities" under California law, no fiduciary relationship
12 existed between Plaintiffs and Castro. As a result, this cause
13 of action fails.

14 ***b. Embezzlement***

15 Federal law controls the definition of embezzlement for
16 purposes of § 523(a)(4). First Delaware Life Ins. Co. v. Wada
17 (In re Wada), 210 B.R. 572, 576 (9th Cir. BAP 1997) (citations
18 omitted). Embezzlement is defined as the "fraudulent
19 appropriation of property by a person to whom such property has
20 been [e]ntrusted or into whose hands it has lawfully come."
21 Transamerica Commercial Financial Corp. v. Littleton (In re
22 Littleton), 942 F.2d 551, 555 (9th Cir. 1991) (citing Moore v.
23 United States, 160 U.S. 268, 269 (1885)). In the
24 nondischargability context, embezzlement requires proof by a
25 preponderance of the evidence of: (1) property rightfully in the
26 possession of a nonowner; (2) the nonowner's appropriation of the
27 property to a use other than that for which it was entrusted; and
28 (3) circumstances indicating fraud. In re Littleton, 942 F.2d at

1 555 (citations omitted). It does not require the existence of a
2 fiduciary relationship. In re Littleton, 942 F.2d at 555
3 (citations omitted).

4 Here, there was clearly no embezzlement of the \$125,000
5 First Investment as the evidence at trial showed that: (1)
6 Plaintiffs gave Castro the funds for the purpose of investing in
7 RGT; and (2) Castro actually did transfer the funds to RGT.
8 Thus, as to the First Investment, there was no proof of
9 misappropriation of funds and the cause of action for
10 embezzlement fails.

11 Regarding the \$50,000 Second Investment, the court
12 acknowledges that the circumstances surrounding this investment
13 are bizarre and that Castro's story regarding where the funds
14 went, why, and what happened to them, is fairly unbelievable.
15 Having said that, it was Plaintiffs' burden to prove embezzlement
16 and they failed.

17 First, as to the initial transfer of the \$50,000 from SSG's
18 account to Forex Capital Markets, it is clear from Stirton's
19 testimony that while he transferred the funds to SSG willingly,
20 he had no understanding at all of what the \$50,000 was to be used
21 for. He apparently made little, if any, inquiry prior to
22 transferring the funds to SSG's account and, at trial, could not
23 testify consistently regarding what he thought he was causing
24 Bonita to invest in. Stirton presented no written agreement
25 regarding the ultimate destination for the \$50,000 and the
26 promissory note documenting the Second Investment (which was
27 prepared at Stirton's request and reviewed by him before he
28 signed it), was similarly silent regarding the anticipated use

1 for the funds. Plaintiffs can hardly complain that the funds
2 were used for something other than the intended purpose when
3 there was no understanding of or agreement (written or otherwise)
4 about the intended purpose. Thus, Plaintiffs failed to sustain
5 their burden to show misappropriation by a preponderance of the
6 evidence.

7 Plaintiffs also failed to sustain their burden to show
8 circumstances indicating fraud by a preponderance of the
9 evidence. As articulated at trial, the court was left with the
10 impression that Castro was enamored with Wolfe and the appearance
11 of Wolfe and RGT's legitimacy and the prospect of healthy returns
12 on investment. Put simply, he appears to have been a shill for
13 Wolfe's apparently-fraudulent activity. But there is no evidence
14 that he actually participated in the fraud or even knew about it
15 until well after the fact.

16 Plaintiffs also argue rather vaguely that Castro's failure
17 to trace the \$50,000 supports a finding of embezzlement.
18 Plaintiffs apparently want the court to conclude that because it
19 is unclear where the funds went, Castro must have committed some
20 wrongdoing sufficient to support nondischargability.
21 Unfortunately for Plaintiffs, that is not the way the law works.
22 The burden was on Plaintiffs to prove all of the elements of this
23 cause of action. Plaintiffs cited, and the court can find, no
24 case law that dictates otherwise. Plaintiffs could have
25 subpoenaed bank records and witnesses in an attempt to prove that
26 Castro had misappropriated all or a portion of the \$50,000. They
27 failed to do so. Because Plaintiffs failed to prove
28 embezzlement, the cause of action must fail.

1 Finally, the fact that \$36,000 of the \$50,000 was returned
2 to SSG's account and \$32,000 of that amount was subsequently
3 returned to Bonita requires the court to consider whether Castro
4 "embezzled" the approximately \$4,000 that he failed to return to
5 Bonita. The court finds that he did not.

6 The record shows that when Castro learned that \$14,000 of
7 the \$50,000 had been lost, he requested that the remaining
8 \$36,000 be returned. The \$36,000 was returned to SSG's account
9 and Castro instructed Corporate Nevada to forward those funds to
10 Bonita. Ultimately, however, only \$32,000 was transferred to
11 Bonita as Castro testified that Corporate Nevada had taken \$4,000
12 to pay outstanding fees owed by SSG and to reimburse Bay Valley
13 Realty for funds it had previously advanced to SSG. Castro
14 testified that it was his understanding that Corporate Nevada had
15 authorization to automatically deduct fees from any available
16 funds in SSG's account. He further testified that he did not
17 realize that Corporate Nevada would be taking funds out of the
18 \$36,000. Finally, he testified that he tried to return the
19 outstanding \$4,000. All of this testimony went unchallenged.
20 Thus, while the first two elements for embezzlement were arguably
21 satisfied, the requirement to show circumstances indicating
22 fraud, was not. Again, Plaintiffs could have challenged this
23 testimony. They could have called witnesses from Corporate
24 Nevada. They could have produced the agreement between Corporate
25 Nevada and SSG. They did not. As a result, they failed to meet
26 their burden of proving embezzlement by a preponderance of the
27 evidence.

28 / / / /

1 **c. Larceny**

2 Federal law also controls the definition of larceny for
3 purposes of § 523(a)(4). Ormsby v. First American Title Company
4 of Nevada (In re Ormsby), 591 F.3d 1199, 1205 (9th Cir. 2010).
5 Larceny is defined as a "felonious taking of another's personal
6 property with intent to convert it or deprive the owner of the
7 same." Id. (citations omitted). Larceny is distinguished from
8 embezzlement in that the original taking of the property was
9 unlawful. In re Quinones, 537 B.R. 942, 950 (Bankr. N.D. Cal.
10 2015) (citing In re Montes, 177 B.R. 325, 332 (Bankr. C.D. Cal.
11 1994)).

12 Here, there was no unlawful taking of Plaintiffs' property.
13 Plaintiffs gave the First Investment and Second Investment funds
14 to SSG and/or Castro freely. Thus, Plaintiffs have not and
15 cannot establish larceny by a preponderance of the evidence.

16 **VII. Section 523(a)(6)**

17 In their Post-Trial Brief, Plaintiffs effectively dismissed
18 or withdrew the § 523(a)(6) cause of action, acknowledging that
19 it is "unnecessary and untenable." As a result, the court will
20 not address the cause of action.

21 **VIII. Conclusion**

22 For all of the foregoing reasons, the court finds that
23 Plaintiffs failed to carry their burden of proving by a
24 preponderance of the evidence that: (1) Castro was personally
25 liable to Plaintiffs on the First Investment and Second
26 Investment; (2) the debts resulting from the First Investment and
27 Second Investment were debts obtained by false pretenses, a false
28 representation or actual fraud as required by § 523(a)(2)(A); and

1 (3) the debts resulting from the First Investment and Second
2 Investment were debts that arose from fraud or defalcation while
3 acting in a fiduciary capacity, embezzlement, or larceny as
4 required by § 523(a)(4). As a result, the debts resulting from
5 the First Investment and Second Investment are dischargeable.
6 Judgment shall be entered in favor of Defendant.

7 * * * End of Memorandum Decision * * *
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Court Service List

No Court Service Required